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9 UNITED STATES DISTRICT
10 FOR THE EASTERN DISTRICT OF WASHINGTON

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 vs.

14 JONNY SHINEFLEW,

15 Defendant.

Case No.: 2:19-CR-00215-TOR-2

**GOVERNMENT'S
SENTENCING MEMORANDUM**

16 Plaintiff, United States of America, by and through Joseph H. Harrington,
17 Acting United States Attorney for the Eastern District of Washington, and Ann T.
18 Wick, Assistant United States Attorney for the Eastern District of Washington,
19 submits the following memorandum setting forth the government's position at
20 sentencing. The government recommends that the Court sentence the defendant to 24
21 months on Count 41, consecutive to a term of imprisonment of 120 months for Counts
22 1 and 38, all followed by a five-year term of supervised release.
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BACKGROUND

Defendant Jonny Shineflew is being sentenced for his role in a 10-defendant bank fraud conspiracy. Defendant pleaded guilty to Conspiracy to Commit Bank Fraud (Count 1), Mail Theft (Count 38), and Aggravated Identity Theft (Count 41), pursuant to a written plea agreement, wherein the government and Defendant agreed to recommend a five-year term of supervised release, and Defendant agreed to pay restitution in the amount of \$29,453.15 and a money judgment in the amount of \$8,831.80. ECF No. 476. The parties are free to recommend any legal term of imprisonment and fine. *Id.*

Both parties objected to the Presentence Investigation Report (PSR). The government objected to the PSR's loss calculation and lack of role adjustment. ECF No. 517. Defendant objected to a two-level enhancement applied for the offense involving over 10 victims and to the PSR not identifying U.S.S.G. § 5K2.23 as a potential basis for a downward departure. ECF No. 516. Defendant also objected to a factual representation regarding the circumstances of his reported ADHD diagnosis. *Id.* Subsequent to the government's objection regarding loss, Defendant filed a belated objection to the PSR's loss calculations, as well as to a factual representation regarding the seed company checks discussed in greater detail below and in the government's Objection. ECF No. 518.

1 The government submits that its objections should be sustained. The
2 government further submits that Defendant's objections as to loss amount and victim
3 count should be overruled.

4 LEGAL ANALYSIS

5
6 The Ninth Circuit has set forth a basic framework which the district courts
7 should follow in compliance with the Supreme Court's ruling in *United States v.*
8 *Booker*, 543 U.S. 220 (2005):
9

- 10 (1) Courts are to begin all sentencing proceedings by correctly determining
11 the applicable sentencing guidelines range, precisely as they would have
12 before *Booker*.
- 13 (2) Courts should then consider the § 3553(a) factors to decide if they
14 support the sentence suggested by the parties. Courts may not presume
15 that the guidelines range is reasonable. Nor should the guidelines factors
16 be given more or less weight than any other. They are simply to be
17 treated as one factor among the § 3553(a) factors that are to be taken into
18 account in arriving at an appropriate sentence.
- 19 (3) If a court decides that a sentence outside the guidelines is warranted, then
20 it must consider the extent of the deviation and ensure that the
21 justification is sufficiently compelling to support the degree of the
22 variance.
- 23 (4) Courts must explain the selected sentence sufficiently to permit
24 meaningful appellate review.

25 *United States v. Carty*, 520 F.3d 984, 991-92 (9th Cir. 2008).

SENTENCING CALCULATION

I. Statutory Maximum and Minimum Sentence

For the defendant's conviction for conspiracy to commit bank fraud, the Court may impose a term of imprisonment of up to 30 years, a fine of up to \$1,000,000 or double gross proceeds, a term of supervised release of up to five years, and a special assessment of \$100. PSR ¶ 247.

For the defendant's conviction for mail theft, the Court may impose a term of imprisonment of up to five years, a fine of up to \$250,000, a term of supervised release of up to three years, and a \$100 special assessment. PSR ¶ 247.

For the defendant's conviction for aggravated identity theft, the Court must impose a minimum term of imprisonment of two years, consecutive to any other sentence, and may impose a fine of up to \$250,000, a term of supervised release of up to one year, and a \$100 special assessment. PSR ¶ 247.

II. United States Sentencing Guidelines Calculation

"As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." *Gall v. United States*, 552 U.S. 38, 49 (2007).

A. Offense Level Calculation

The PSR incorrectly calculated the defendant's total offense level as 13. PSR ¶ 60. This calculation is based on a loss amount of \$20,201.48, between \$15,000 and

1 \$40,000 (PSR ¶ 51) and does not include an enhancement for Defendant's supervisory
2 role in the offense pursuant to U.S.S.G. §3B1.1(b). The government objected on these
3 grounds. ECF No. 517. Defendant also objected to loss (ECF No. 518), as well as to
4 a two-level enhancement for Defendant's offense involving 10 or more victims under
5 U.S.S.G. §2B1.1(b)(2)(A). ECF No. 516.

7 **1. 12 levels should be added due to Defendant's intended loss of**
8 **\$489,983.83.**

9 The government submits that the loss amount in this case should be based on
10 Defendant's intended loss of \$489,983.83, pursuant to U.S.S.G. §2B1.1. ECF No.
11 517. This is because the Guidelines Commentary directs that the greater of intended
12 loss or actual loss is to be used to calculate the offense level. §2B1.1 n.3(A). *See*
13 *United States v. Cingari*, 952 F.3d 1301, 1308 (11th Cir.), cert. denied, 141 S. Ct. 835,
14 208 L. Ed. 2d 409 (2020) ("To properly interpret the Sentencing Guidelines, we begin
15 with the language of the Guidelines, considering both the Guidelines and the
16 commentary.") (internal citation omitted). "The guideline and the commentary must
17 be read together, because the commentary may interpret the guideline or explain how
18 it is to be applied." *Id.* (internal citation and quotation omitted).

19 Defendant counters that this Commentary should be ignored, because the term
20 "loss" in §2B1.1 is unambiguous. ECF No. 519. However, Defendant's objection
21 ignores, *inter alia*, U.S.S.G. §1B1.7: "The Commentary that accompanies the
22 guideline sections may serve a number of purposes. First, it may interpret the
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1 guideline or explain how it is to be applied. Failure to follow such commentary could
2 constitute an incorrect application of the guidelines, subjecting the sentence to
3 possible reversal on appeal.” U.S.S.G. §1B1.7 (citing 18 U.S.C. § 3742).

4 “[C]ommentary explains the guidelines and provides concrete guidance as to how
5 even unambiguous guidelines are to be applied in practice.” *Stinson v. U.S.*, 508 U.S.
6 36, 44 (1993). Commentary is binding on courts unless it violates the Constitution or
7 a federal statute, or is plainly erroneous or inconsistent with the Guideline at issue.
8
9 *Stinson*, at 45-47.

11 The government’s reply to Defendant’s position is set forth in greater detail in
12 ECF No. 525, and is incorporated herein. The bottom line is that Guidelines
13 Commentary, including that which defines actual and intended loss, is authoritative
14 and binding on this Court. *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019) did not change this
15 rule. Moreover, if the Supreme Court had meant for *Kisor* to change this rule, it could
16 have granted certiorari in *Cingari*; it did not. 141 S.Ct. 835 (Mem), 208 L.Ed.2d 409
17 (2020). Thus, this Court is to look to the definition of loss in the Commentary to
18 determine Defendant’s offense level and apply the greater of actual or intended loss.
19
20 §2B1.1 n.3(A).

23 The government submits that the correct enhancement for loss in this case is 12
24 levels, pursuant to §2B1.1(b)(1)(G), based on an intended loss between \$250,000 and
25 \$550,000.
26

2. Three levels should be added as a role adjustment.

Pursuant to U.S.S.G. §3B1.1(b), three levels should be added for Defendant's supervisory role in his crimes of conviction. A three-level increase is warranted where a defendant is a manager or supervisor and the criminal activity involved five or more participants or was otherwise extensive. *Id.* To summarize the government's argument set forth in more detail at ECF No. 517 and incorporated herein: there were 10 co-defendants involved, the criminal activity was extensive, there were agreements to split the proceeds amongst the co-conspirators depending on their participation in the scheme, and various aspects of the conspiracy were directly supervised by Defendant, such as with Co-Defendant Pilon and Co-Defendant Tabitha Shineflew. Defendant also exercised control over Co-Defendants Bordelon and Johnston.

3. The PSR correctly added two levels for the number of victims.

U.S.S.G. §2B1.1(b)(2)(A) provides that two levels should be added where "the offense" "involved 10 or more victims." A "victim" includes, *inter alia*, any person, corporation, and company who "sustained any part of the actual loss determined under [§2B1.1](b)(1)." §2B1.1 n.1. Further:

In a case in which undelivered United States mail was taken, or the taking of such item was an object of the offense, or in a case in which the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail, 'victim' means (I) any victim as defined in Application Note 1; or (II) any person who was the intended recipient, or addressee, of the undelivered United States mail.

§2B1.1 n.4(C)(i).

1 The actual loss attributable to Defendant's offense is \$30,453.15. ECF No. 8. That
2 total is derived from conduct causing actual loss to at least 10 victims, including
3 Numerica Credit Union, Alphacard, Home Depot, Golden Hills Brewery, Leo
4 Gassling and Son, TRM Services, Jake's Café, Pepmove, Royal Business Systems,¹
5 and the victim from Spokane County Case No. 18-1-04662-0. PSR ¶¶ 144, 146. The
6 addressees of the checks Defendant stole from the mail are additional victims. §2B1.1
7
8 n.4(C)(i).
9

10 If the Court sustains the government's objections, the adjusted offense level is
11 26, after adding 12 levels based on loss amount, 2 levels based on number of victims,
12 and 3 levels for a role adjustment. After a 3-level reduction for acceptance of
13 responsibility, the total offense level is 23.
14

15 B. Criminal History Calculation
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17 The PSR correctly calculated the defendant's criminal history category as
18 category VI, based on a total of 25 points. PSR ¶ 149.
19

20 C. Advisory Guideline Range
21

22 Based on a total offense level of 23, the advisory range in this case is 92-115
23 months.
24

25 **IMPOSITION OF SENTENCE**
26

27 ¹ Based on check nos. 4276, 1248, 52820, 1385, 1258, 9825, 6284, 40347,
28 7807, 29609, 9401, and 25576.

1 **I. Imposition of a Sentence under 18 U.S.C. § 3553**

2 A. 18 U.S.C. § 3553(a) factors

3 1. The nature and circumstances of the offense

4 The Court is well-informed as to the nature and circumstances of Defendant's
5 present crimes, as Defendant is the last of the 10 defendants to be sentenced.
6 Defendant stole checks, altered checks, presented stolen and fraudulent checks for
7 payment, manufactured and provided to others counterfeit identifications, to include
8 identification of another person, to pass and attempt to pass the fraudulent checks.
9 The batch of checks stolen from the Landmark Turf and Native Seed mailbox, totaled
10 approximately \$458,498. Through the course of the conspiracy, fraudulent checks
11 were successfully passed by Defendant and co-conspirators for a total of \$29,453.15,
12 not including amounts based on checks not charged in the Indictment but charged in
13 state court cases and included as relevant conduct in Defendant's PSR, and
14 codefendants' PSRs. Defendant personally realized proceeds in the amount of
15 \$8,831.80, again not including proceeds gained from fraudulent check activity
16 charged in other court cases. The nature and circumstances of the defendant's offense
17 support a significant prison sentence of the kind recommended by the government.
18

19 2. The history and characteristics of the defendant

20 The defendant's history and characteristics support an above-guideline
21 sentence. Defendant is no stranger to the criminal justice system. At the age of 20,
22

1 Defendant committed, in three separately filed cases, three counts of forgery and one
2 count of grand theft. PSR ¶¶ 66-71. He was convicted of the first forgery in
3 September 1993, the second forgery and grand theft in April 1994, and the third
4 forgery in May 1994. *Id.* At the age of 21, Defendant committed burglary, while
5 released on another felony case. PSR ¶ 73-75. After a 32-month prison sentence,
6 Defendant next evaded police, apparently while driving under the influence. PSR
7 ¶¶ 76-77. After several parole violations in that case, Defendant committed First
8 Degree Burglary in 2002, now 28 years old. PSR ¶¶ 77-78. Defendant broke into the
9 victim's home, assaulted her in her bedroom, hog-tied her with flex-ties, and held a
10 knife to her throat. PSR ¶¶ 80-81. Shortly after he served the three-year sentence
11 imposed for that crime, Defendant again burglarized a dwelling, this time using a
12 firearm to restrain his victims. PSR ¶¶ 85-97. Before being sentenced for the crime,
13 Defendant committed two more theft crimes. PSR ¶ 98, 108. Defendant was paroled
14 in January 2013. PSR ¶ 102. By July 2013 he had returned to crime and committed
15 several instances of identity theft before the end of the year. PSR ¶¶ 112-117. After
16 another period of incarceration, Defendant was committed First Degree Trafficking in
17 Stolen Property, more identity theft, possession of a \$30,000 stolen vehicle, more
18 forgery, and residential burglary, all in 2018, partially overlapping the bank fraud
19 conspiracy of the present federal case. PSR ¶¶ 118-148. He was sentenced in relation
20 to several of those crimes in 2019 and entered a state drug court program in November
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1 2019. PSR ¶ 156. Defendant absconded from Drug Court by January 2020. PSR
2 ¶ 153.

3 Defendant's history and repetition of the kinds of crimes captured in the PSR
4 support a sentence of 120 months, plus the consecutive 24-month sentence required
5 for Count 41.
6

- 7 3. The need for the sentence imposed to reflect the seriousness
8 of the offense, to promote respect for the law, and to provide
9 just punishment.

10 Although not a violent crime, fraud is not a victimless crime. A sentence of the
11 kind recommended by the government provides just punishment in this instance.
12

- 13 4. The need for the sentence imposed to afford adequate
14 deterrence and to protect the public.

15 As noted above, this is not Defendant's first time being sentenced for fraud
16 crimes. Indeed, Defendant's extensive criminal history—extending over thirty years
17 and broken only by periods of incarceration—demonstrates that Defendant has
18 continually and willfully victimized members of the community, notwithstanding the
19 various lengths of jail and increasing prison sentences of his past. Neither the prison
20 sentences, nor the opportunities of probation or parole, were sufficient to deter
21 Defendant from the present offenses. Nor did previous opportunities for substance
22 abuse treatment prevent Defendant from his life of crime. Defendant was most
23 recently given an opportunity to participate in the Spokane County Drug Court
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1 program, which he entered in November 2019. PSR ¶ 156. Defendant absconded
2 within two months, despite his wife expecting a child, and despite knowing that a
3 federal investigation of Defendant's crimes was pending. ECF Nos. 315 at 7, 476 at
4
5 6.

6 With the record before this Court, the Court has an opportunity to impose a
7 sentence that not only deters Defendant from returning to crime, but also other like-
8 minded individuals. A substantial prison sentence of the kind recommended by the
9 government adequately serves the goals of deterrence and protection of the public.
10

11 5. The kinds of sentences available
12

13 The Court must sentence Defendant to prison and may also impose a fine and
14 include a term of supervised release. Probation is precluded by statute. PSR ¶ 227.
15

16 6. The established sentencing range
17

18 The established sentencing range depends on the Court's rulings regarding the
19 parties' objections. The government submits that the correct advisory range is 92-115
20 months, based on a total offense level of 23.

21 7. The need to avoid unwarranted sentence disparities
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23 A sentence proposed by the government would avoid unwarranted sentence
24 disparities.
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8. The need to provide restitution to any victims of the offense

Defendant stipulated in his plea agreement to pay restitution in the amount of \$29,453.15. ECF No. 476 at 12. The amount payable to each victim is as follows:

\$3,778.62 to AlphaCard
\$2,850 to Bank of America
\$3,845.49 to Heritage Bank
\$1,053.18 to Home Depot
\$4,550 to Key Bank
\$4,000 to Numerica
\$1,115.86 to Umpqua Bank
\$8,260 to Washington Trust Bank

The government requests that this restitution be joint and several with the following co-defendants, as follows:

Angus Johnston, in the full amounts set forth above.

Tabitha Shineflew, in the amount of \$2,000 to Numerica.

Jared Pilon, in the amount of \$1,053.18 to Home Depot.

Michael Slater, in the amount of \$2,555 to Washington Trust Bank.

Anthony Wright, in the amounts of:

\$384.90 to AlphaCard
\$290.40 to Bank of America
\$391.80 to Heritage Bank
\$107.10 to Home Depot
\$463.50 to Key Bank
\$407.40 to Numerica
\$113.70 to Umpqua Bank
\$841.20 to Washington Trust Bank

1 Britney McDaniel, in the amounts of:

2 \$641.50 to AlphaCard
3 \$484 to Bank of America
4 \$653 to Heritage Bank
5 \$178.50 to Home Depot
6 \$772.50 to Key Bank
7 \$679 to Numerica
8 \$189.50 to Umpqua Bank
9 \$1,402 to Washington Trust Bank

10 Adrianna McCrea, in the amounts of:

11 \$2,850 to Bank of America
12 \$4,550 to Key Bank
13 \$2,850 to Washington Trust Bank

14 Jordan Yates, in the amounts of:

15 \$641.50 to AlphaCard
16 \$484 to Bank of America
17 \$653 to Heritage Bank
18 \$178.50 to Home Depot
19 \$772.50 to Key Bank
20 \$679 to Numerica
21 \$189.50 to Umpqua Bank
22 \$1,402 to Washington Trust Bank

23 Tyler Bordelon, in the amounts of:

24 \$256.60 to AlphaCard
25 \$193.60 to Bank of America
26 \$261.20 to Heritage Bank
27 \$71.40 to Home Depot
28 \$309 to Key Bank
\$271.60 to Numerica
\$75.80 to Umpqua Bank
\$560.80 to Washington Trust Bank

B. Application of the Guidelines in Imposing a Sentence under 18 U.S.C. § 3553(b)

The Guidelines, formerly mandatory, now serve as one factor among several that courts must consider in determining an appropriate sentence. *Kimbrough v. United States*, 552 U.S. 85, 90 (2007). It remains, however, that “the Commission fills an important institutional role: It has the capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.” *Id.* at 108-09 (internal quotation marks omitted). Thus, “the Commission’s recommendation of a sentencing range will ‘reflect a rough approximation of sentences that might achieve § 3553(a)’s objectives.’” *Id.* (quoting *Rita v. United States*, 551 U.S. 338, 350 (2007)).

The Guidelines are the sole means available for assuring some measure of uniformity in sentencing, thereby fulfilling a key congressional goal in adopting the Sentencing Reform Act of 1984. Reference to the Guidelines, while carefully considering the 3553(a) factors, is the only available means of preventing the disfavored result of basing sentences on the luck of the draw in judicial assignments. Therefore, “district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.” *Gall*, 552 U.S. at 50 n.6.

The government is asking the Court in this case to follow the Guidelines as outlined in this Memorandum, then depart upward under the guidance of the

Guidelines, as outlined in the Government's Motion for Upward Departure, filed contemporaneously. A district court must consider the guidelines range, *see* § 3553(a)(4), and is usually well-advised to follow the Sentencing Commission's advice in order to assure fair, proportionate, and uniform sentencing of criminal offenders. There are no 3553(a) factors in this case which warrant imposition of a sentence below the advisory range; to the contrary, the 3553(a) factors on balance support the imposition of the recommended above-guidelines sentence. Accordingly, the government recommends a sentence of 120 months on Counts 1 and 38, followed by 24 months on Count 41.

CONCLUSION

Application of 18 U.S.C. § 3553 supports a total sentence of 144 months in this case. The government submits that such a sentence is sufficient, but not greater than necessary, to accomplish the goals of sentencing, and that a lesser sentence is not supported by application of the 18 U.S.C. § 3553(a) factors.

Dated: June 9, 2021.

Joseph H. Harrington
Acting United States Attorney

s/ Ann T. Wick
Ann T. Wick
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system. Counsel of record will be sent a copy of this filing by e-mail.

s/ Ann T. Wick

Ann T. Wick

Assistant United States Attorney